ALLEN D. MILLER

IBLA 91-381 Decided April 24, 1995

Appeal from a decision of the Kremmling Resource Area Manager granting a right-of-way for the Muddy Creek Reservoir. COC-45805.

Affirmed.

1. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Rights-of-Way--National Environmental Policy Act of 1969: Environmental Statements--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976--Water and Water Rights: Generally

   The requirement that in preparing an EIS an agency shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated," 40 CFR 1502.14(a), does not require an agency to discuss alternatives that would not satisfy the purposes of the proposed action or that are remote and speculative. In an EIS on a proposed right-of-way to construct a dam and reservoir, BLM's review of alternatives was reasonable, and its reasons for having eliminated from detailed study alternatives that could not be implemented in time or about which there was insufficient information available were sufficient and were adequately discussed.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976--Water and Water Rights: Generally--Water and Water Rights: State Laws

   When considering applications for rights-of-way privileges, the Department of the Interior has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of state law.

3. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976

A BLM decision exercising the Secretary's discretion to grant a right-of-way will be affirmed on appeal where the record demonstrates that it was based upon a reasoned analysis of all relevant factors, was made with due regard for the public interest, and sufficient reasons for disturbing the decision are not shown.

APPEARANCES: Allen D. Miller, Palmer Lake, Colorado, pro se; John R. Kunz, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management; Donald H. Hamburg, Esq., Glenwood Springs, Colorado, for the Colorado River Water Conservation District.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Allen D. (Dave) Miller has appealed the June 17, 1991, decision of the Area Manager, Kremmling Resource Area, Bureau of Land Management (BLM), granting a right-of-way to the Colorado River Water Conservation District (River District) for the Wolford Mountain Reservoir on Muddy Creek north of Kremmling in Grand County, Colorado (referred to in this opinion as the Muddy Creek Reservoir). We previously upheld appellant's right of appeal. Allen D. Miller, 125 IBLA 139 (1993). In this decision we deal with his reasons for appeal. 1/

On April 3, 1985, the River District filed an application with the U.S. Forest Service (Forest Service) for a special use permit for the construction of a water storage reservoir on Rock Creek in the Yampa Ranger District, Routt National Forest. This application resulted from the River District's agreements with the Municipal Subdistrict, Northern Colorado Water Conservancy District, under which the River District was to plan and construct a water storage facility to mitigate potential harm to water users resulting from construction of the Windy Gap Project (River District Answer, Exhs. A and B). In the course of analyzing the proposed Rock Creek Reservoir, an alternative reservoir site on Muddy Creek was identified. Therefore, on May 5, 1988, the River District filed an application with BLM for a dam and reservoir on Muddy Creek pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLMPA), as amended, 43 U.S.C. §§ 1761-1771 (1988).

In response to these applications, the Forest Service and BLM conducted environmental analyses of the effects of the proposed projects and

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1/ Trans Mountain Hydro Corporation's appeal of BLM's decision (IBLA 91-380) was dismissed by order dated Sept. 3, 1992, in response to Trans Mountain's notice that it had resolved its differences with the River District.

reasonable alternatives pursuant to the National Environmental Policy Act (NEPA), 43 U.S.C. § 4332(C)(2) (1988). A draft environmental impact statement (DEIS) was issued by the Forest Service as lead agency in August 1987. A Supplemental Draft EIS (SDEIS) was issued by the Forest Service and BLM as co-lead agencies in August 1988. The SDEIS identified a 60,000-acre-foot reservoir at Site C on Muddy Creek as the Forest Service and BLM preferred alternative (SDEIS at 2-38). The Final Environmental Impact Statement (FEIS) for the Rock Creek/Muddy Creek Reservoir was issued in February 1990. It also concluded that Site C on Muddy Creek was the preferred alternative. 2/

Meanwhile, the City and County of Denver was considering various alternatives as additional water supplies for the Denver Metropolitan Area. "Denver felt that the best alternative was its Two Forks Project, a proposed dam in Eastern Colorado that would impound water diverted through Denver's Robert's Tunnel from the Blue River in Western Colorado" (River District Answer at 3). The Omaha District of the U.S. Army Corps of Engineers initiated a Systemwide Environmental Impact Statement of the Metropolitan Denver Water Supply (Denver EIS) which was completed in March 1988. "Because of the use by Denver of a portion of the yield from Muddy Creek Reservoir as an interim water supply, the Denver EIS was relevant to the analysis undertaken in the Muddy Creek FEIS" (River District Answer at 5). 3/

In a Record of Decision dated February 8, 1991, BLM approved the FEIS preferred alternative for the Muddy Creek Reservoir right-of-way and an amendment to BLM's Kremmling Resource Management Plan to accommodate the anticipated recreational use of the Muddy Creek Reservoir. See FEIS at

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2/ Rock Creek/Muddy Creek Reservoir FEIS at 1-33.

3/ Denver's involvement in the project is explained in the FEIS as follows:

"The River District proposes to utilize a reservoir on either Rock Creek or Muddy Creek in a manner that meets both Metropolitan Denver and West Slope water demands and that the District considers to be consistent with its statutory mandate. The proposed interim operation of the project involves the lease of a major portion of the reservoir yield to the Denver Water Board for 25 years to be used by Denver to meet water needs in the Metropolitan Denver Area. Following this 25-year period, Denver could renew the lease for any portion of the firm annual yield that the River District determines is not necessary for western Colorado use. This lease could provide the District with the means to finance a portion of this project and to pursue its statutory obligations in support of present and future water needs in western Colorado. During the period of the lease the District would retain at least 10 percent of the yield of the project to support or service water users in western Colorado."

(FEIS at 1-2). See also River District Answer at 3-4 and Exh. D.

1-33 to 1-35. The Kremmling Area Manager issued the River District a right-of-way grant effective June 17, 1991, for a period of 30 years with a provision that the grant may be renewed. Under the right-of-way grant, the River District "receives a right to construct, operate, maintain, and terminate a dam, reservoir, roads, parking area, pipelines, and ditches, on public lands" located in T. 2 N., R. 80 W., T. 2 N., R. 81 W., T. 3 N., R. 81 W., T. 1½ N., R. 80 W., T. 1 N., R. 80 W., sixth principal meridian, containing approximately 557 acres.

In his statement of reasons (SOR) for appeal, Miller contends that the Muddy Creek right-of-way decision is not valid under NEPA because it failed to consider major environmental impacts on Colorado's Blue River and also failed to consider the less damaging water supply alternatives for Metro Denver (SOR at 1). Appellant asserts that although the stated purpose of the Muddy Creek project is to mitigate potential harm from the Windy Gap Project, he believes that this purpose has been altered to facilitate another transmountain diversion to Metro Denver from the Blue River in Summit County which has greater environmental impacts than the Windy Gap Project.

Appellant argues that almost all of the analysis in the FEIS centers on the local environmental impacts of the reservoir in Grand County. Appellant argues that the reservoir is to serve as exchange storage to facilitate an additional 30,000 acre-feet diversion to Metro Denver from Summit County's Blue River. Miller asserts that the Blue River has already lost over 50 percent of its historic flow to the Front Range and that the Muddy Creek diversion would further seriously deplete the Blue River's current gold medal trout fishery. Miller claims that the FEIS is deficient because it lacks any cumulative analysis of Muddy Creek with other Front Range diversion rights that Metro Denver plans to develop on the Blue River including the Straight Creek, East Gore, Green Mountain, Two Forks, and Shoshone projects (SOR at 1).

Miller contends that since Muddy Creek is in fact another water supply option for Denver, it should have been evaluated with "all reasonable alternatives" as required by NEPA, including ongoing alternatives such as City of Thornton's City-Farm Recycling Project, AWDI's San Luis Ground Water Project, and Arapahoe County's Transmountain Diversion from the Gunnison Basin in which appellant states he has "a substantial investment and continuing financial interest." 4/ Miller states that the U.S. Environmental Protection Agency vetoed the Two Forks Dam because the Denver

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4/ In a letter to the Board dated Aug. 4, 1992, Miller stated: "Please be advised I would drop the Muddy Creek appeal if the Colorado River District would drop its shortsighted court opposition and cooperate with the environment enhancing Gunnison alternative * * *." See River District Reply, Exh. B.

EIS ignored these and other viable alternatives; he urges that the Muddy Creek decision should be reversed for the same reason (SOR at 2).

[1] NEPA requires that an EIS consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii) (1988). Council on Environmental Quality regulations provide that Federal agencies shall, to the fullest extent possible, "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 CFR 1500.2(e). Further, agencies shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 CFR 1502.14(a). Agencies need not discuss alternatives that would not satisfy the purposes of the proposed action or that are remote and speculative. Headwaters, Inc. v. BLM, Medford District, 914 F.2d 1174, 1180-81 (9th Cir. 1990); City of Aurora v. Hunt, 749 F.2d 1457, 1467 (10th Cir. 1984); Roosevelt Campobello International Park Commission v. U.S. Environmental Protection Agency, 684 F.2d 1041, 1047 (1st Cir. 1982). In a leading case on the requirement to discuss alternatives, Judge Leventhal stated that "the alternatives required for discussion are those reasonably available * * *." Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972). Judge Leventhal continued:

> Since the [EIS] also sets forth that the agency's proposal was put forward to meet a near-term requirement * * * the possibility of the environmental impact of long-term solutions requires no additional discussion at this juncture. * * * In the last analysis, the requirement as to alternatives is subject to a construction of reasonableness * * *. There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of "alternatives" put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies -- making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed.

Id. at 837-38.

The River District Answer points out that the SDEIS, in its discussion of related projects, refers to and incorporates by reference the Denver EIS descriptions of

> both system-wide and site-specific alternatives to supply this water [for future growth of the metropolitan Denver area].

> Included in the various system-wide alternatives, as projects to meet metropolitan Denver's near-term water needs, are West Slope Exchanges. These exchanges are described in the [Denver EIS] Appendix 4 - Water Sources for Future Supply, Appendix 4B - Water Sources Selected for Use in Alternative Scenarios, Volume 5 - Blue River Exchange/Joint Use Reservoir. This document identifies both the Rock Creek and Muddy Creek (Wolford Mountain) reservoirs as components in a Blue River Exchange Scenario * * *. Data on West Slope exchanges in the [Denver EIS] are specifically incorporated by reference pursuant to 40 CFR 1502.21. [5/]

(SDEIS at 1-21; see also SDEIS at 1-5 incorporating Denver EIS appendices analyzing near-term and long-term water needs of metropolitan Denver). The Denver EIS also considered several reservoirs, including the Union Park project in which appellant has an interest and the City of Thornton city-farm program to which he referred, but eliminated them from inclusion in the scenarios evaluated because they could not be implemented in time or there was insufficient information available (River District Answer, Exh. K, Denver EIS, at 3-28 to 3-30; see also River District Answer, Exh. O. 6/

5/ 40 CFR 1502.21 provides:

"Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference."

The Denver EIS material was available for review at the Forest Supervisor's Office, Routt National Forest, 29587 West U.S. 40, Suite 20, Steamboat Springs, Colorado, or at the BLM Kremmling Resource Area Office, 1116 Park Avenue, Kremmling, Colorado (SDEIS at 1-21).

6/ "Union Park Reservoir. The Union Park project met all four of the screening criteria for scenario sources. As with the Green Mountain Pumping project, however, the Corps determined that the Union Park project was not an alternative to Two Forks because it could not be implemented within the same timeframe. The major time constraint to the Union Park project relates to its required use of the [Bureau of Reclamation's] Taylor Park Reservoir. * * * [Bureau of Reclamation personnel] did indicate that approval could take several years because impact and, possibly, mitigation studies for Taylor Park would be required and would eventually have to be approved by either the Commissioner of the [Bureau of Reclamation] or Congress." (Denver EIS at 3-28 - 3-29).

"Thorton's Cooperative City-Farm Program. This proposal would involve the transfer and exchange of water with agricultural interests

Appellant also urged consideration of these projects in his January and October 1988 comments on the Draft EIS and the SDEIS for the Muddy Creek Reservoir. In his October 1988 comments, appellant stated:

> Before any additional diversions are contemplated from the severely depleted Upper Colorado tributaries, Colorado water supply EIS efforts should first address all reasonable options for meeting the state's future growth requirements. For example, city-farm recycling of water already being diverted is a common practice, but was not considered in this EIS. The vast untapped surplus waters of the Gunnison were also not considered. Recent engineering studies show both of these sources to be potentially more cost effective and less damaging to the environment than the cumulative impact of only diverting from a single basin. * * * Engineering studies show that a large, high altitude Gunnison reservoir at Union Park can enhance Colorado's four major river environments during droughts while meeting most of the water needs of both slopes for the next 30 to 50 years. This is the type of balanced natural resource development that is the objective of all reasonable environmental and business interests. The National Environmental Policy Act was specifically enacted to force consideration of all reasonable options when making major development decisions that may substantially impact the environment. The responsible permitting agencies have no other choice but to strictly adhere to this Congressional mandate.

(FEIS at 7-25; see also FEIS at 6-54). BLM responded that "[a] variety of structural and non-structural alternatives to the proposed project were considered (See Section 2.2 SDEIS). City-farm recycling of water would not meet the purpose of the proposed project. The projects referenced in this comment are not viable near-term alternatives to meet the short term need in the mid-1990's (See Section 1.2.3.2) nor would they meet the applicant's purpose for the proposed project (See Section 1.2.2)" (FEIS at 7-25). Section 1.2.2 of the SDEIS states that the purpose of the proposed action is
for the River District to meet its obligations under its agreements to mitigate potential harm to prospective water users in the Upper Colorado River

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fn. 6 (continued)
north of Denver. It is believed that this project would meet all four of the screening criteria for scenario sources. * * * The city was reluctant to discuss the details of its proposal, particularly potential firm annual yield which involves water rights litigation. Consequently, the Corps was unable to determine sufficient information on the proposal to include it
in any of the detailed analyses of the Final EIS."
(Denver EIS at 3-30).

These projects were discussed further in Technical Appendix 4A, Water Sources Not Selected for Use in Alternative Scenarios, under "Projects of Others."

and to provide for a 25-year lease of most of the yield of the reservoir to the Denver Water Board. See River District Answer, Exhs. A, B, and D supra, and SDEIS at 1-3.

Thus, BLM determined that these projects did not meet the criteria it established to determine alternatives that would be reasonable and feasible, i.e., (1) "the alternative should provide approximately the same water yield as anticipated with the Azure Project (about 20,000 acre-feet)," (2) "total project cost and cost per acre-foot of water yield should be reasonable in relation to the Azure-Windy Gap Supplemental Agreement," (i.e., about $10,200,000, see River District Answer, Exh. B) and (3) "the project should be located within reasonable proximity of Windy Gap, the project being mitigated" (SDEIS at 2-1; FEIS at 1-6).

Based on the SDEIS, FEIS, and the portions of the Denver EIS incorporated by reference, we find BLM's review of alternatives was reasonable, its reasons for having eliminated the City of Thornton and Union Park projects from detailed study were sufficient and were adequately discussed, and its discussion of the impacts of the Muddy Creek Reservoir on the Blue River was adequate. Headwaters, Inc. v. BLM, Medford District, supra; City of Aurora v. Hunt, supra; Natural Resources Defense Council, Inc. v. Morton, supra.

[2] To the extent appellant's reasons for appeal may involve questions of State water law, e.g., whether "the stated purpose of Muddy Creek * * * to provide West Slope mitigation for water diverted to the Front Range by the Windy Gap Transmountain Diversion Project * * * has been grossly altered to facilitate another transmountain diversion to Metro Denver from the Blue River" (SOR at 1), we must leave the answers to the Colorado State courts, where they belong. "When considering an application for determination of right-of-way privileges, the Department of the Interior has no power to determine questions of control and appropriation of water rights as between private parties, as such questions are exclusively matters of State law. Broken H Ranch Co., 33 IBLA 386 (1977); Harold C. Brown, A-30536, 73 I.D. 172 (May 31, 1966); Hatch Brothers Co., A-27525 (Jan. 13, 1958)." East Canyon Irrigation Co., 47 IBLA 155, 162 (1980). See also Lidstone v. Block, 773 F.2d 1135, 1136-37 (10th Cir. 1985).

Appellant also refers to "water quantity and quality concerns" for the Blue River posed by the Muddy Creek Reservoir that "are included in Summit County's 10 page April 12, 1990 protest of the Muddy Creek FEIS" (SOR at 1-2). "These concerns are included in this appeal by this reference herein," appellant states. Id. at 2. Summit County's April 12, 1990, protest was untimely under 43 CFR 1610.5-2(a)(1) and was dismissed. Nevertheless, BLM responded to the issues raised in a letter dated October 23, 1990. In addition, the River District engaged a consulting firm to review the concerns (River District Answer, Exh. N). The firm's memorandum, dated October 22, 1990, states:

> It is clearly stated in the FEIS (Section 1.1, page 1-2) that "this Final EIS summarizes and updates but does not duplicate information contained in the SDEIS. For a more detailed discussion of specific topic areas, reference to the SDEIS (August 1988) is suggested." It is not clear that the Summit County comments are based on review of the SDEIS as well as the FEIS for specific topics. The issues of eutrophication in the reservoir, salinity, and selenium have been thoroughly addressed (see SDEIS Section 4.4.3.5, pages 4-126 through 4-131).

Appellant does not point out why BLM's response and the firm's memorandum do not adequately address these concerns. "Where an appellant does not state with some particularity the reason for appeal, and, as appropriate, support the allegation with argument or evidence showing error, the appeal will not be favorably considered." American Colloid Co., 128 IBLA 257, 262 (1994).

[3] Section 501(a) of FLPMA, 43 U.S.C. § 1761(a) (1988), authorizes the Secretary of the Interior to grant a right-of-way for "(1) reservoirs * * * and other facilities and systems * * * for the impoundment, storage, transportation, or distribution of water." This authority has been committed to the discretion of BLM. Daryl Richardson, 125 IBLA 132, 134 (1993); C. B. Slabaugh, 116 IBLA 63, 65 (1990). The implementing Federal regulations for these rights-of-way are found at 43 CFR Part 2800. A BLM decision exercising the Secretary's discretion will be affirmed on appeal where the record demonstrates that it was based upon a reasoned analysis of all relevant factors, was made with due regard for the public interest, and sufficient reasons for disturbing the decision are not shown. Daryl Richardson, supra at 134; East Canyon Irrigation District Co., supra. Based on our review of the record, we find no sufficient reason for disturbing BLM's June 17, 1991, decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Will A. Irwin
Administrative Judge

I concur:

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James L. Byrnes
Chief Administrative Judge